

**PLAINTIFFS' RESPONSE TO
GOOGLE'S SUBMISSION RE:
PRIVILEGE RE-REVIEW**

**Redacted Version
of Document Sought
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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
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 CASTILLO, and MONIQUE TRUJILLO
 individually and on behalf of all similarly
 situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

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Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' RESPONSE TO
 GOOGLE'S SUBMISSION RE:
 PRIVILEGE RE-REVIEW (DKT. 566)**

The Honorable Susan van Keulen

1 Plaintiffs respectfully respond to Google's April 29 submission (Dkt. 566) regarding
2 Google's Court-ordered re-review of 1,000 privilege log entries where (i) the document was
3 designated as privileged in the text, but no attorney was identified on Google's privilege log; and
4 (ii) emails where an attorney is in the to, cc, or bcc line but does not respond (Dkt. 542).

5 Plaintiffs now ask that the Court order Google to re-review all additional entries in these
6 two categories. This re-review by Google is warranted based on (1) Google's **37% error rate** with
7 those 1,000 entries (with Google changing its designations for 371 documents) and (2) the high
8 likelihood that Google's re-review of the additional entries will similarly yield production of
9 relevant, non-privileged documents that Google improperly withheld.

10 Google's error rate is alarmingly high, which in itself warrants additional review. Google
11 "chang[ed] its privilege designation" for 371 out of the 1,000 documents. Dkt. 566 at 1. Google's
12 37% error rate for this set of 1,000 entries is even more concerning than, in this Court's own words,
13 the "significant correction rate of 25%" for the first 830 documents that Google re-reviewed. Dkt.
14 522 at 1-2. Google's earlier 25% error rate, for an even smaller set, "g[ave] the Court pause" and
15 led the Court to conclude that "[s]ome form of reassessment of privilege assertions is warranted."
16 Dkt. 522 at 2. Google's subsequent 37% error rate, for an even larger set (which Google
17 characterizes as a "random sample" but "not a representative sample"), shows that further review
18 is necessary. Even Google's initial re-review proposal admitted that an error rate of over 10%
19 warrants additional review. *See* Dkt. 533 (Google submission stating: "If the error rate for these
20 500 documents is over 10%, Google will re-review an additional random sample of 500 documents
21 from the same two categories described above.").

22 Additional review by Google is also warranted given that these Google errors resulted in
23 Google improperly withholding key documents. Google notes that some of these documents were
24 duplicates (116 out of the 371, according to Google), but Google's April 29 production of
25 previously withheld documents contained a treasure trove of unique, key documents (or portions
26 thereof) that Google would have continued withholding but for this Court's re-review Order. For
27 example:
28

- 1 • **GOOG-BRWN-00848723**: A January 2019 internal Google presentation regarding
2 “Consent Conclusions” summarized the results of a Google User Experience Research
3 *project that assessed whether “users really understand what they’re consenting to*
4 *when they consent to share browsing history or other behaviour data.” Id. at -24.*
5 Google’s “*conclusion*” was “*No.*” *Id. at -26.* “The research shows that participants
6 don’t read the text without guidance and *don’t understand the text* when they do.” *Id.*
7 “Additionally, a large fraction of users feel they have no choice in the bargain, or that
8 the choice is difficult to find and the playfield is slanted against them.” *Id.*
- 9 • **GOOG-BRWN-00853326**: In a July 2021 email, a Google employee admitted that
10 [REDACTED]
11 [REDACTED] ” *Id. at -29.*
- 12 • **GOOG-BRWN-00850441**: Assessing a Google disclosure that promises “more
13 control over the data Google collects,” a Google employee in April 2016 commented
14 that “this may be fine if it’s a broad reference to Google’s data collection policies but
15 *it’s not fine if it suggests to the user the ability to control the types of data collected.*”
16 *Id.* The Google employee thus anticipated how users would interpret Google’s promise
17 of “control,” which is at issue in this case.
- 18 • **GOOG-CABR-04780837.R**: In February 2020, Google engineer Sammit Adhya
19 (whom Plaintiffs deposed last year, without this withheld information) commented on
20 a document titled “The Incognito Story” to note that: “IANAL [I am not a lawyer], but
21 from a legal perspective, *we would never saf[y] that Google doesn’t know who you are*
22 *while you’re Incognito.*” *Id. at -40.R.*¹
- 23 • **GOOG-CABR-05888096**: In an October 2020 internal Google presentation titled “IP
24 Address: Updates,” Google described the need to “*Remove IP Fields in Incognito*” as
25 a “Med / High” priority, including to “*Limit Join / Subpoena / ID risks.*” *Id. at -104.*
- 26 • **GOOG-BRWN-00848778**: In a March 2010 email discussing fingerprinting, one
27 Google employee remarked “*I can profile you with your installed plugins, font list, .*
28 *. . . etc. Not to mention your IP.*” *Id. at -79.* The same employee challenged others to
“ask[] ourselves what it is that we’re trying to offer,” including whether Google is truly
attempting to “*offer an anonymous browsing mode (for real).*” *Id.*
- **GOOG-BRWN-00854174**: In April 2019, Google Vice President of Chrome Darin
Fisher emailed Google CEO Sundar Pichai to express his “concern[] that, without
making a strong statement about web privacy” at the upcoming Google I/O conference,
“*our silence will be very noticeable,*” and Mr. Fisher offered a “recommendation [to]
add language . . . to [Sundar’s] remarks.” *Id. at -75.*
- **GOOG-CABR-05886497**: A September 2016 document expresses concern that users
will “think[] that Incognito connections in Chrome are *somehow private from Google.*”
The document continues: “This is *not the first time Incognito has led to confusion.*”
Id. at -98.
- **GOOG-CABR-05894563**: In an August 2021 internal Google document from the

¹ Google previously produced a version of this document where the language quoted here was cut-off, and only visible within the document’s metadata. See GOOG-BRWN-00157001. By contrast, the withheld version, produced on April 29, 2022, contained this quote in the document itself.

1 custodial files of Michael Kleber, whom Plaintiffs deposed in January, Google
 2 employees admit that “*users expect that their browsing history across sites is kept
 private*: known only to them, and their web browser.” *Id.* at -64.

3 At best, Google’s privilege review has been woefully inadequate. Whether these
 4 designations were mistakes or intentional, the existence of Google’s internal “Communicate with
 5 Care” practice raises serious concerns regarding the manner in which documents were created and
 6 then reviewed for production. *See, e.g., United States v. Google, LLC*, Case No. 1:20-cv-03010-
 7 APM, at Dkt. 326-1 (Mar. 21, 2022, D.D.C.). Google has now re-reviewed almost 2,000 entries
 8 from its privilege log and changed its privilege designation for roughly 31% of them. This means
 9 that many key documents, like the ones above, are being withheld improperly. Google’s April 29
 10 submission does not argue that it would be burdensome to undertake an additional re-review, nor
 11 does Google provide any information about how many documents fall into the two categories at
 12 issue that would need to be re-reviewed. Whatever the number is, given the circumstances, this is
 13 not an undue burden and is proportional to the needs of this case.

14 For these reasons, Plaintiffs respectfully submit that the Court order Google to re-review
 15 all documents on its privilege log where (i) the document was designated as privileged in the
 16 document’s text, but no attorney was identified on Google’s privilege log; and (ii) emails where
 17 an attorney is in the to, cc, or bcc line but does not respond. Plaintiffs are continuing to evaluate
 18 any additional relief that they make seek in terms of these improperly withheld documents,
 19 including for example limited additional deposition testimony.

20 Dated: May 9, 2022

Respectfully submitted,

22 By: /s/Amanda Bonn

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